Nos. 90-408 and 90-577

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
Respondent.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
Cross-Petitioner,

v.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Cross-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR LA PLATA COUNTY, COLORADO; BANNOCK COUNTY, LEWIS COUNTY AND POWER COUNTY, IDAHO; BECKER COUNTY AND MAHNOMEN COUNTY, MINNESOTA; BLAINE COUNTY, FLATHEAD COUNTY, GLACIER COUNTY, LAKE COUNTY AND ROOSEVELT COUNTY, MONTANA; THURSTON COUNTY, NEBRASKA; MOUNTRAIL COUNTY AND SIOUX COUNTY, NORTH DAKOTA; CORSON COUNTY, DEWEY COUNTY, LYMAN COUNTY, TODD COUNTY AND ZEIBACH COUNTY, SOUTH DAKOTA; DUCHESNE COUNTY, UTAH; AND FREMONT COUNTY, WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

TOM D. TOBIN *
TOBIN LAW OFFICES, P.C.
422 Main Street
Winner, South Dakota 57580
(605) 842-2500
* Counsel of Record

(Additional Counsel Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

224

SUSAN W. PAHLKE
Todd County Deputy
States Attorney
P.O. Box 432
Winner, South Dakota 57580
(605) 842-2551

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONGRESSIONAL MATERIALS:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE

The concern that prompts the filing of this Brief can be simply stated. The tax records in county court houses are being rifled. Since 1987 tribal governments across the country, with the assistance and encouragement of the United States, have challenged the validity of county ad valorem taxes on Indian fee lands. Almost without exception, the tribal arguments are loosely premised on bits and scraps of language from several unrelated opinions of this Court in the 1970s. As a result, members of tribes have refused to pay their taxes (everywhere), tax abatement petitions have been filed (La Plata County, Colorado), individual lawsuits have been filed against counties in State courts (Corson County, South Dakota), tribal lawsuits have been filed against counties in federal courts (two in Montana), and even worse, the United States, just a year ago, after the decision below, targeted one *Amici* county and sued the county and the State in federal court in the name of the United States (Todd County, South Dakota). (Federal complaint with attachments; one inch thick, burdensome interrogatories and requests for production of documents). Apart from the fact that county governments can ill afford to squander scarce resources on senseless litigation, the issue here threatens the very core of county fiscal integrity.

The Counties joining in this Brief all contain areas that at one time were established as Indian Reservations. They are representative of many other counties similarly situated throughout the United States. As this Court has often noted, fee lands are scattered throughout the counties, some of which are owned by Indians and Indian Tribes. The history of each area is, of course, as varied and diverse as federal Indian policy—with one exception. Historically, every county has routinely taxed these fee lands and this practice has been the accepted rule for decades.

To be sure, the extent of Indian fee ownership varies from reservation to reservation and reflects radically different fact situations. As *Amici* States note, the precise

amount of lands nationally has not been determined. Locally, tribal enrollment lists are not ordinarily available to county governments and even these lists do not include non-member Indians, who also own fee property. So we are not certain of the total sum involved. One thing, however, is certain. The amount is substantial—because these counties also contain large areas of other lands that are non-taxable and held in trust by the United States for Indians and Indian tribes. For example, in Todd County, South Dakota, approximately 60 percent of the entire county is held in trust by the United States for the Rosebud Sioux Tribe or its members or other Indians. Of the taxable land, Indian fee land on paper roughly constitutes more than 10 percent of the seven hundred and fifty thousand ($750,000) to eight hundred and fifty thousand ($850,000) dollars of total taxes collected by the county per year in recent years. In Dewey County, South Dakota, the same figure represents roughly 8 percent of the total taxes collected. In other counties the percentage could be more and in some counties it is undoubtedly less. But the exact percentage is beside the point. Whatever the amount, county government in these areas is not some new and novel experience. It has been there for decades pursuant to Congressional Policy. That Congressional Policy has authorized the taxes here—and not on a case by case basis as the court of appeals has indicated. The issue in this case represents a fundamental and most basic concept in Federal Indian Law that has been resolved and relied on for decades. For this reason, *Amici* respectfully submit that this Court authoritatively document and set forth that concept in this case.

Although the United States did not participate below except as *Amicus* in support of the tribal petition for rehearing and suggestion for rehearing *en banc*, at that time the United States told the court of appeals that to tax Indian fee lands would "create an exception *without* any policy basis, from the general rule that the state may not tax Indians or their property on reservations." Mem-

orandum for the United States at 2. By Order of January 7, 1991, this Court invited the Solicitor General to file a brief in this case expressing the views of the United States. The United States responded by *now* asserting in this Court that various Acts of Congress and judicial decisions "*changed*" the effect "that Section 6 (including its provision) otherwise would have". Brief for the United States at 15-16, n.10 (emphasis added). This is a significant concession. What the United States still did not tell this Court *Amici* would submit, is even more significant. Time and time again for almost three decades since the alleged change occurred, the United States has told everyone else, including this Court, a different story.

SUMMARY OF ARGUMENT

Petitioners and *Amici Curiae* States have set forth in detail the reasons the court of appeals misconstrued *Brendale*, and while we agree with those important points, they are not repeated here.

The argument of *Amici Curiae* Counties centers around the fundamental validity of the taxes in question and the support for that position in the legislative history of the General Allotment Act and in the manner in which the United States and this Court have consistently construed this most important legislation.

ARGUMENT

I. The General Allotment Act Clearly Authorized the Taxation of Fee Patent Land.

Perhaps no other area of Federal Indian Law has been better understood than the taxing of Indian fee lands authorized by Congress in the General Allotment Act of 1887 (24 Stat. 388). In the beginning, even the general public was involved in the debate on the fundamental aspects of the question presented. Meetings were held, memorials passed, and Congress was inundated with the pros and cons of the allotment policy. When first introduced in 1881, the Senate debated the overall issue day after day. In subsequent years, the debate continued,

bills passed the Senate, were stalled in the House, and in 1887 the measure finally passed. Some of this legislative history was recently submitted to this Court by the United States in *United States v. Mitchell*, 445 U.S. 535 (1980). A more complete index is set forth in *Amici* App. 1a-2a. The General Allotment Act documents cited there are replete with evidence that Congress clearly intended, after the expiration of the twenty-five year trust, that Indian fee lands would be taxed as all other fee lands. For example, in 1881, the first provision that incorporated this concept stated:

> That the lands acquired by any Indian under and by virtue of this act shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance or by the judgment, order or decree of any court, or subject to taxation of any character, but shall be and remain inalienable, and not subject to taxation, lien, or incumbrance, for the period of twenty-five years from the date of the patent, which said restrictions shall be incorporated in the patents when issued. 11 Cong. Rec. 875 (1881). *Amici* App. 3a.

When Senator Dawes introduced the language of the present section in related legislation, he stated "The Indian, therefore, under the law will be to all intents and purposes the occupant of the land and enjoy all its uses and at the end of the twenty-five years the United States will be obliged by the force of this provision to give him or his heirs a patent discharged of the trust and free of incumbrance. It will be impossible to raise the question of taxation under that provision . . . 13 Cong. Rec. 3211 (1882). *Amici* App. 5a-6a.

It was clear, as Senator Coke stated in similar debate, that "Section 5 prohibits the alienation of land by the Indians; it exempts the land from taxation, from lien or incumbrance *for twenty-five years*." 11 Cong. Rec. 876-877 (1881) (emphasis added). And thereafter, the record is replete with similar statements, "Mr. Dawes. . . . The bill protects the property of the Indians for twenty-

five years. *That is the limit.* That is the intent of the bill." 15 Cong. Rec. 2242 (1884) (emphasis added). Other representative statements to this same effect are set forth in *Amici* App. 3a-10a.

When Congress amended this provision for unrelated reasons in the Burke Act in 1906 (34 Stat. 182), this understanding was reflected in the text of the Act, as Petitioner and *Amici* States have discussed at length. It is also reflected in the legislative history set forth verbatim in *Amici* App. 16a-56a and in the related documentation in *Amici* App. 57a-179a.

As one would expect, in other instances, whenever the subject was addressed in congressional debate or in House or Senate Reports, the explanation was always the same—both before and after the Burke Act of 1906. For example, when Congressman Burke addressed the House of Representatives in 1904, he referred to the twenty-five year trust exemption twice in the same debate:

> The man who goes into that section of the country goes in there with a handicap of one-fifth of the land *nontaxable for twenty-five years*, and he has got to pay his proportionate increase of the expenses of that community for all that time. . . . The Indians will have the benefit of the roads, of the courts, and the benefits of a county and State government without contributing a cent therefor, their lands being *nontaxable for twenty-five years*, as before stated, while the settler who takes a homestead and acquires title to the same must do his share in paying these expenses. . . .

38 Cong. Rec. 2830 (1904) (emphasis added).

And in 1910, when Senator Gamble submitted a Report for the Committee on Indian Affairs, the Report similarly reflected this understanding:

> Considering the fact that the Indian allotments are *relieved from taxation for a period of twenty-five years* and the Indians are to receive like advantages with the whites in connection with the above, it is thought by your committee that such a provision is

> wise, equitable, and just not only to the Indians but to the prospective settlers. . . .

S. Rep. No. 68, 61st Cong., 2d Sess. at 4 (1910) (emphasis added).

Although Congress continued to amend the General Allotment Act over the course of the next two decades, none of the subsequent Amendments or supporting congressional documentation specifically focused on the fact that the tax exemption was tied to the twenty-five year trust period. It was presumed that this was naturally the case and there was no perceived need to ever clarify or direct any remarks to this point in any of these materials. However, the adoption of a more liberal policy for the issuance of fee patents in 1917 did eventually prompt Congress to indirectly address this commonly held presumption and in so doing, thereby lay to rest any argument or doubt that Congress could have ever intended or understood the exemption in any other way.

In 1917, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, adopted the more liberal policy of issuing patents in fee sooner to all Indians of less than half blood and issuing others on a less restrictive basis to those of larger percentage of Indian blood without individual applications. "Competency commissions" were dispatched to several reservations to accomplish this objective. This new declaration of policy provided in part that:

> The time has come for discounting guardianship of all competent Indians and giving even closer attention to the incompetent that they may more speedily achieve competency. Broadly speaking, a policy of greater liberalism will henceforth prevail in Indian administration to the end that every Indian, as soon as he has been determined to be as competent to transact his own business as the average white man, shall be given full control of his property. . . .

L. Schmeckebier, *The Office of Indian Affairs, Its History, Activities and Organization*, at 152-153 (1927).

With this concerted policy as guidance, the consequences were predictably arbitrary, far reaching, and understandably subject to quick criticism and remedial action not at issue here. However, to the extent that premature taxation was stated as one necessary result of the process, the documentation surrounding the "forced fee" policy merits attention. With this limited purpose in mind, the documents are probative and unequivocal.

For example, by 1921 it was apparent to the Commissioner of Indian Affairs that apart from those "influences which sought to hasten the *taxable* status of the property" by "the termination of the trust title" and the issuance of "patents in fee", the degree of blood should not be a deciding factor to establish competency and applications should still be required:

> [A]s there are numerous instances of full-bloods who are clearly demonstrating their industrial ability by the actual use made of their land and who are shrewdly content with a *restrictive title thereto that exempts them from taxation.* . . .

L. Schmeckebier, *supra* at 156-157 (emphasis added).

Congressional attention first focused on the issue when Congressman Williamson from South Dakota was informed that the Department of the Interior could not take "corrective" action on a forced fee patent without express congressional direction. As a result, on January 18, 1926, the Secretary of the Interior, Dr. Hubert Work, forwarded a draft of a department bill to the Committee on Indian Affairs. As justification for the measure, Secretary Work explained:

> During the year 1919, and later, the then Secretary caused a great number of patents in fee simple to be issued to adult allottees, or to their heirs of less than one-half Indian blood, without application by the Indians for such patents, believing that such mixed-blood adult Indians were competent and capable of managing their own affairs. . . . This department canceled patents issued to two Coeur d' Alene Indians who had refused to accept their patents or

> to *pay taxes*, and suit was brought to cancel the assessments. The United States Circuit Court of Appeals, Ninth Circuit, in these two cases, *United States v. County of Benewah* and *United States v. County of Kootenai, Idaho* (290 Fed. 628), held that the Secretary of the Interior had no authority under the act of May 8, 1906, to issue a patent in fee to an Indian *allottee during the trust period without an application* therefor; that a patent so issued did not pass title and such patents having been refused, the cancellation of the patent was upheld. . . . [T]he department desires legislative authority to cancel such patents where there has been no voluntary sale or encumbrance of the land.

S. Rep. No. 536, 69th Cong., 1st Sess. at 2-3 (1926) (emphasis added), *Amici* App. 63a.

For the purpose of the issue here, Secretary Work shared the commonly held presumptions noted above:

> [*P*]*atents, prima facie, subject the lands to taxation and other liens.* . . . [I]ndians who had refused to accept their patents or to pay taxes. . . . Few of the Indians will or can pay taxes. . . . Practically all these lands have been placed on the tax rolls and some have been sold for nonpayment of assessments.

S. Rep. No. 536, 69th Cong., 1st Sess. at 2 (1926) (emphasis added), *Amici* App. 63a.

The bill was introduced on January 23, 1926. 67 Cong. Rec. 2630 (1926). In the House Report patents in fee are again equated with taxation:

> Under existing law it has been held by the courts that the Indians have a vested right in the *tax-free status* of their allotments *during the trust period* fixed by law. . . . [T]hey did not want their patents in fee on the ground that they would be unable to pay the taxes. . . . [F]oreclosure or tax deed or disposed of them by sale. . . . [A]cceptance of the fee patent and a waiver of *the tax-exempt privileges of a trust patent.* . . .

H.R. Rep. No. 1896, 69th Cong., 2d Sess. at 1-2 (1927) (emphasis added). *Amici* App. 67a. It passed the House

without debate and was reported in the Senate on April 2, 1926. 67 Cong. Rec. 6763 (1926). Shortly thereafter, on April 10, 1926, 67 Cong. Rec. 7272 (1926), the measure passed the Senate and was signed by the President on February 26, 1927. 68 Cong. Rec. 4892 (1927). Act of February 26, 1927 (44 Stat. 1247).

In 1930, in response to bill that would have created a commission to investigate the entire matter, the Department of the Interior proposed a letter of instructions to all superintendents to gather the information needed and then report back to Congress. H.R. Rep. No. 2269, 71st Cong., 3rd Sess., at 3-5 (1931). Once again, taxation of patents in fee was a stated premise in the list of the questions contained in the instructions:

> Has any of the land been sold for debt or taxes?. . . . If canceled, have tax assessments or tax sales been canceled or paid assessments refunded?. . . .

H.R. Rep. No. 2269, 71st Cong., 3rd Sess. at 4 (1931). *Amici* App. 83a.

After the materials from the instructions were compiled, the new Secretary of the Interior, Ray Lyman Wilbur, reported back to Congress and proposed a bill to amend the 1927 Act and address the unanswered concerns: namely, that the Department be authorized to cancel certain fee patents and return the land to trust status if any portion of the allotment was not encumbered.

In his letter of transmittal dated December 18, 1930, Secretary Wilbur shared the same assumptions regarding fee patents and taxation related by his predecessor, Secretary Work. H.R. Rep. No. 2269, 71st Cong., 3d Sess. at 3-5 (1931), *Amici* App. 83a.

Congressman Williamson reported the bill as amended in the House of Representatives on January 14, 1931. 74 Cong. Rec. 2193 (1931). This time even the text of the bill expressly reflects the concept of the *taxation of fee patents.*

> Provided, That this act shall not apply where any such lands have been sold for *unpaid taxes* assessed after the date . . . .

H.R. Rep. No. 2269, 71st Cong., 3d Sess. at 1-2 (1931) (emphasis added), *Amici* App. 83a.

The balance of the Report confirms the same understanding in every conceivable manner:

> [I]t has been held by the courts that the Indians have a vested right in the *tax-free status* of their allotments *during the trust period* fixed by law. . . . [T]hey did not want their *patents in fee* on the ground that they would be unable to pay the *taxes*. . . . [N]ot pay the rapidly accruing *taxes*. . . . [L]ands through foreclosure or tax deed or disposed of them by sale. . . . Placing a voluntary encumbrance upon or disposing of land so patented must in law be considered as an acceptance of the fee patent and a waiver of the *tax-exempt privileges of a trust patent*. . . . *Taxes*, or even *tax deeds* can not be said to be encumbrances of a character to prevent cancellation. . . . [A]s to the States examined provision is made for reimbursement to tax-certificate holders, with interest, in all cases where taxes have been canceled. . . . All purchasers at tax sale are put upon notice as to any defect in making the tax levy and are not innocent holders for value. . . . [C]ases where the lands may have been sold for unpaid taxes assessed after the date of the encumbrance.

H.R. Rep. No. 2269, 71st Cong., 3d Sess. at 2-3 (1931) (emphasis added), *Amici* App. 83a.

On January 28, 1931, Congressman Williamson was requested to explain the bill on the floor of the House of Representatives because he had made a "special study" of the matter:

> Mr. Williamson: It will mean this: There are still a few hundred tracts of land for which patents in fee have been issued without the consent of the holders of the trust patents, and if this bill is passed it will enable the Secretary of the Interior, upon the application of these Indians, to cancel the patents in fee to such of their lands as are unencumbered. This will have the effect of restoring their *trust-patent status*. In other words, this will mean that the lands

> will *no longer be subject to taxation* or any other kind of encumbrance, and the Indian will then be able to hold the lands without paying taxes *until* the 25-year period of the trust patent has either expired or the extension has expired. . . . The point is these forced fee simple patents were illegally issued. The courts have so held, and the Indians have the undoubted right to have the lands involved restored as trust property. The courts have also held that the Indian has a vested right to the tax free status of his land; that this is a right he is entitled to insist upon. . . .
>
> Mr. Williamson. *These trust patents carried a clause*, which is a part of the law authorizing the trust patent, providing that they shall remain in force for a period of 25 years from the time they were issued. So if these patents are restored they would become effective from the date of the trust patent that was superceded by a patent in fee; in other words, restores them to the status they had before the fee patent was issued. In some cases the 25-year period has been extended either by law or by Executive order. . . . [B]een filed by an Indian whose land has been restored to a trust patent status, the boards have restored the taxes to the Indian. . . . [M]y understanding is, from the information we now have, that there are only between 300 and 400 such tracts of land in the United States. . . . [T]hey found their lands had been *patented* and assessed and that taxes had accumulated. . . . [T]o meet the tax levies and to prevent their lands from being sold for *taxes*. . .

74 Cong. Rec. 3412-3413 (1931) (emphasis added), *Amici* App. 74a-78a. At the conclusion of his remarks the bill passed the House without further discussion. 74 Cong. Rec. 3413 (1931). The Senate adopted the entire House Report, noting that the facts were fully set forth therein and, after a short explanation and reference to the Report, passed the bill without further amendment on February 17, 1931. 74 Cong. Rec. 5195 (1931).

On at least one more occasion Congress revisited the issue in detail. Neither the 1927 Act nor the 1931 Act

provided for reimbursement of the taxes levied on the fee patented lands during the trust periods in question. In 1937, a bill was introduced to determine the status of each patent but it was rejected because the cost was estimated to exceed the amount involved. The next year, a measure that would have provided relief in one state was objected to for that reason. H.R. Rep. No. 669, 76th Cong., 1st Sess. at 2 (1939), *Amici* App. 103a. Finally, on January 3, 1939, a comprehensive bill was introduced. 84 Cong. Rec. 34 (1939).

In the most explicit materials to date, the exemption granted by the 1887 General Allotment Act trust patent was repeatedly tied to the trust period. The Secretary of the Interior, Harold L. Ickes was first to suggest the comprehensive approach. In a letter to the Chairman of the House Committee on Claims, the Secretary stated:

> *Patents in fee* having been recorded covering lands allotted to Indians the county authorities *naturally* felt they were entitled to assess and collect taxes thereon. Doubtless when requests were made for reimbursement of such taxes after the patents in fee were canceled and trust patents reinstated or reissued, the counties either did not have funds in their treasuries available for such payment or the county officials lacked legal authority to pay. *Clearly* the local authorities were not at fault for *taxing* such land *while patents in fee were outstanding*. . . . Upon cancellation of patents in fee, county officials have been requested to remove the allotment from the tax-assessment rolls, cancel any unpaid assessments, tax sales or tax deeds, and refund any taxes paid. . . . [N]ot subject to taxation by State authorities during the years the invalid patents. . . . [R]ight to exemption from taxation was vested. . . . [L]ands had not been sold for unpaid taxes assessed. . . .

H.R. Rep. No. 669, 76th Cong., 1st Sess. at 7-8 (1939) (emphasis added), *Amici* App. 103a.

He also suggested that the title be changed so as to read:

> A bill for the relief of Indians who have paid *taxes* on allotted lands for which *patents in fee* were issued without application by or consent of the allottees and subsequently canceled, and for other purposes.

H.R. Rep. No. 669, 76th Cong., 1st Sess. at 8 (1939) (emphasis added), *Amici* App. 103a.

Later, in response to a request from the Chairman of the House Committee on Indian Affairs for an Interior report on an identical bill, the acting Secretary of the Interior, E. K. Burlew, replied in nearly identical terms. S. Rep. No. 1488, 76th Cong., 3d Sess. at 5-6 (1940), *Amici* App. 122a. One month before the bill was reported in the House of Representatives, Secretary Ickes responded directly to the Chairman of the House Committee on Indian Affairs:

> *Clearly* the local authorities were *not at fault for taxing* these lands while such *fee patents* were outstanding. . . . *Taxes* were levied by the various counties against the lands of the Indians thus receiving these "forced" *fee patents*. . . .

S. Rep. No. 1488, 76th Cong., 3d Sess. at 3 (1940) (emphasis added). All three reports were then appended to the House Report from the Committee on Indian Affairs. S. Rep. No. 1488, 76th Cong., 3d Sess. at 2-8 (1940), *Amici* App. 122a.

The Committee Report itself contains a brief history of the legislation and reflects the understanding clearly set forth in the correspondence from the Department of the Interior:

> The levy and collection of taxes was a duty imposed upon local units of government by statutory law and the bonds of their officials. This was *not* their error. The error was by the United States Government. . . . *Lands so patented naturally* were *taxed until* the trust status was restored. . . . [T]he taxes *logically* levied. . . .

H.R. Rep. No. 669, 76th Cong., 1st Sess. at 1 (1939) (emphasis added), *Amici* App. 103a. The Report further noted that the Secretary concluded that an appro-

priation of seventy-five thousand dollars ($75,000.00) would be sufficient to take care of all cases, present and future. H.R. Rep. No. 669, 76th Cong., 1st Sess. at 2 (1939).

Two weeks before the Report, Attorney General Frank Murphy advised the chairman that this Court had just granted a petition for a Writ of Certiorari in *Board of Comm'rs of Jackson County, Kansas v. United States*, 100 F.2d 929 (1938), *modified*, 308 U.S. 343 (1939), to resolve the question of interest in the same kind of cases present in the bill under consideration. For this reason, the Attorney General recommended that no action be taken with respect to this legislation until the Supreme Court heard and decided the *Jackson County* case. H.R. Rep. No. 669, 76th Cong., 1st Sess. at 4 (1939). For purposes here, it is not without significance that the correspondence of Attorney General Murphy, which was also appended to the House Report, reflects the same understanding found throughout all of the Congressional materials noted above:

> [R]eimburse Indian allottees and Indian heirs of allottees for all *taxes* paid on so much of their allotted lands as, having been *patented in fee* prior to the expiration of the period of trust. . . . [C]ompensate Indian allottees for taxes erroneously collected from them and to relieve the political subdivisions of States of the burden of making restitution in such cases. . . .

H.R. Rep. No. 669, 76th Cong., 1st Sess. at 4 (1939) (emphasis added), *Amici* App. 103a.

As a result of the recommendation of Attorney General Murphy, it was not until the following year, 1940, that the House considered the bill on the merits. 86 Cong. Rec. 1628 (1940). When presented, it passed without amendment or debate. 86 Cong. Rec. 3007 (1940). The Senate Committee on Indian Affairs deemed the matter so fully explained in the House Report that it simply adopted and appended the Report in its entirety. S. Rep. No. 1488, 76th Cong., 3d Sess. (1940). Shortly

thereafter, the full Senate passed the measure without amendments or debate. 86 Cong. Rec. 6988 (1940). Act of June 11, 1940 (5th Stat. 298).[1]

II. The General Allotment Act Was Clearly Understood to Authorize the Taxation of Fee Patent Land.

Immediately after the passage of the 1887 Act, the Secretary of the Interior requested and received an opinion from the Attorney General of the United States. Among other things, this opinion clearly ties the tax exemption to the twenty-five year trust period.

> I am also of opinion that the allotment lands provided for in the act of 1887 are exempt from State or Territorial taxation upon the ground above stated with reference to the act of 1884, namely, that the lands covered by the act are held *by the United States for the period of twenty-five years in trust for the Indians*, such trust being an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority.

19 Op. Atty Gen. 161, 169 (1888) (emphasis added). Later, opinions from the Department of the Interior reinforced this accepted construction. 30 L.D. 258, 266-267 (1900), 50 L.D. 591 (1924), 53 L.D. 107 (1930), 53 L.D. 133 (1930). With specific reference to the Yakima Indian Reservation, in 1930 the Interior Solicitor characterized the issue as follows:

> The United States thus retained its hold on the lands allotted for a period of 25 years after the allotment and as much longer as the President in his discretion might determine, and the *clearly expressed* intent of Congress is that *so long as* the land remains in *that* status it is beyond the power of the State to tax the same for any purpose.

53 L.D. 107 (1930) (emphasis added).

---

[1] More recent litigation related to this issue was resolved in *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987).

This construction of the 1887 Act is repeatedly reflected in every related opinion of the Department of the Interior thereafter until 1989. On April 21, 1989, the 1979 opinion that restated this position was simply rescinded. After citing several cases decided by this Court in the 1970s, an Associate Solicitor of the Department of the Interior reasoned that:

> [L]anguage in some of those decisions suggests the state is on weaker ground when it attempts to tax Indian ownership of land. . . .

Memorandum at 1, BIA. IA. 0943, April 21, 1989. (This Court briefly reviewed some of these same decisions in *Duro* v. *Reina*, 110 S.Ct. 2053 (1990). In contrast to the broad characterization of the Associate Solicitor, *Duro* particularly described the exemption noted there as extending to only "certain taxes on transactions of tribal members. . ." *Duro*, 110 S.Ct. at 2606.) On balance, the prior Interior opinions are entitled to more weight than the 1989 Memorandum. *See*, e.g., *Duro*, 110 S.Ct. at 2063. Other historical sources confirm this position.

The annual reports of the Secretary of the Interior, the Commissioner of Indian Affairs, and the Board of Indian Commissioners, compiled and communicated to Congress each year, are replete with evidence of the historical understanding that this tax exemption was intended and understood to correspond with the trust period. Representative excerpts from these reports are set forth in more detail in *Amici* App. 123a-179a. From the beginning, the Secretary of the Interior quoted the Commissioner of Indian Affairs' conclusion in support of this position:

> Even in the cases where, by taking their lands in severalty, they are in process of becoming citizens, they are still in a state of quasi-independence, because the General Government withholds from them for tweny-five years the power of alienating their lands, while by *exempting them from taxation for the same period*. . . .

Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 52nd Cong., 2nd Sess. at 38 (1891) (emphasis added), *Amici* App. 131a.

And the Commissioner of Indian Affairs expressed the same principle in more than one way:

> Under a principle of law recognized by the courts, *real property held in trust by the Federal Government is not taxable by the State.* . . .
>
> At the same time, with the exception that their lands received under allotment laws will be *exempt from taxation for a period of twenty-five years*, and possibly longer, they will be subject to the burdens borne by other citizens, and must manage their own affairs. . . . Annual Report of the Commissioner of Indian Affairs at 13, 56 (1927) (emphasis added), *Amici* App. 172a.
>
> It also confers authority on the Secretary of the Interior, in his discretion, to *terminate the trust period by issuing a patent in fee* simple whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs. . . . Report of the Commissioner of Indian Affairs, H.R. Doc. No. 5, 59th Cong., 2nd Sess. at 49 (1906) (emphasis added), *Amici* App. 154a.

The Board of Indian Commissioners was authorized by statute in 1869 and organized by an Executive Order of President Grant that same year. In its annual reports to the Secretary of the Interior, the Board made detailed recommendations on the broad Indian policy questions of the day. Because one-half of the members of the 1887 Board continued to serve for the next two decades, it was an informed and influential institution. Year after year the annual reports confirm the essential principles set forth above. Any one of several examples make the point:

> The lands allotted to the Indians are *exempt from taxation for a period of twenty-five years.* . . . Annual Report of the Board of Indian Commissioners at 8 (1887) (emphasis added), *Amici* App. 126a.

> The reception of an allotment of land to which the *title is by law protected from alienation or taxation for twenty-five years.* . . . Annual Report of the Board of Indian Commissioners at 7 (1902) (emphasis added), *Amici* App. 149a.
>
> We have understood that it was largely the wish on the part of the present Commissioner of Indian Affairs to protect allottee Indians against the evils which follow the sale and the use of intoxicants, which led him to advocate the amendment to the general severalty act known as the Burke law, by which Indians allotted after May 8, 1906, do not become citizens by virtue of allotment until after the expiration of *twenty-five years*, the period covered by the *protected title* to their lands—the *trust deed* from the United States *which keeps* Indian allotments inalienable and *untaxed* for that length of time. . . . Annual Report of the Board of Indian Commissioners at 7-8 (1906) (emphasis added), *Amici* App. 155a.
>
> [T]he wise statesmanship of Senator Dawes and others who framed and carried into effect the Dawes Act of February, 1887, proposed to train Indians for citizenship by intrusting them at once, on allotment, with the duties and the conscious responsibilities of active, local citizenship, and with the manhood—stimulating right of suffrage, while the homestead was made inalienable and was *freed from taxation by* the United States *trust deed* for twenty-five years. . . . Annual Report of the Board of Indian Commissioners at 8 (1906) (emphasis added), *Amici* App. 155a.

In addition to the annual reports, guest speakers such as the Commissioners of Indian Affairs and Senator Dawes were invited each fall to address the Board at its Lake Mohonk Conference. The proceedings were transcribed and appended to the annual report, and constitute yet another source that reflects this same understanding. For example, in 1893 Senator Dawes referred to "[a]llotted Indians, *not* a foot of whose land can be *taxed for twenty-five years*" . . . . Proceedings of the Board of Indian Commissioners at 11th Lake Mohonk Indian Confer-

ence as reported in the Annual Report of the Board of Indian Commissioners at 61 (1893) (emphasis added). In 1895, Commissioner of Indian Affairs Browning similarly stated "[w]hen the lands are allotted to the Indians and they become citizens, under the law the lands are *not taxable for twenty-five years*" . . . . Proceedings of the Board of Indian Commissioners at 5th Lake Mohonk Indian conference as reported in the Annual Report of the Board of Indian Commissioners at 37 (1895) (emphasis added). Early texts by other authorities support this same construction.

For example, F.E. Leupp, the Commissioner of Indian Affairs at the time of the 1906 Burke Act also viewed the restrictions on taxation as tied to the trust status of the land. In his 1910 text, Commissioner Leupp summarized the administration of the General Allotment Act from his perspective and discussed the taxation issue in the context of fee lands. Leupp, *The Indian And His Problem*, 34, 47, 64, 75 (1910). (Also, *see Amici* App. 46a, 50a, where the recommendations of Commissioner Leupp are contained in the House and Senate Reports on the Burke Act.)

James McLaughlin worked for fifty-two years, 1871-1923, in the Indian service. As an inspector in the Department of the Interior, he had more experience in dealing with the General Allotment Act than any other individual of his time. In 1910, he summarized this experience in the following words:

> In the process of civilization, they had arrived at a stage of their progress when, as part of the usual policy, they were given their lands in severalty. To each individual was allotted one hundred and sixty acres of land, the title to which was to be held in trust by the government for twenty-five years and then patented in fee to the allottee. The allotted lands were to be free of taxes *during* the trust period.

McLaughlin, *My Friend the Indian*, 106 (1910) (emphasis added). *See* Pfaller, *James McLaughlin, The Man With the Indian Heart*, xi, 331-332 (1978).

Later, the Institute for Government Research published a series of authoritative monographs giving a detailed description of each of the more distinct services of the government. In 1927, Laurence F. Schmeckebier's *The Office of Indian Affairs, Its History, Activities and Organization*, the most extensive text on the subject to that date, reflects this same understanding. "[T]he several states are not allowed to tax Indian property *held* by the United States *in trust* . . . . [T]ribal and allotments *held in trust* are exempt from state and local taxation . . . ." Schmeckebier, *supra*, at 9, 11 (1927) (emphasis added).

A year later, the Institute responded to a special request of the Secretary of the Interior with the publication of *The Problem of Indian Administration*, commonly called the Meriam Report after it's principal author. More will be said about this Report by others, but it is important to remember here that the explanation on taxation confirms again the opinions on this subject set forth above.

> When an Indian is declared competent to manage his own property and is given a *fee deed* to it, his property becomes *subject to state and local taxation*. . . .
>
> Under the allotment act the incompetent Indian holding a *trust patent* is generally *exempt from taxation*. On the day he is declared competent and is given his *fee patent*, he straightway becomes subject to the full burden of *state and local taxation*. . . . *The Problem of Indian Administration*, at 95, 477 (1928) (emphasis added).

Shortly thereafter, Dr. D.S. Otis was actually employed by the Bureau of Indian Affairs to write an entire book on the "History of the Allotment Policy". Through the efforts of the Commissioner of Indian Affairs, John Collier, Otis' monograph was inserted in its entirety in the hearing records of the Indian Reorganization Act of 1934 (Readjustments of Indian Affairs). Once again, in the most comprehensive and fact specific text to date, described by the editor of the 1973 edi-

tion, Francis Paul Prucha, as "a careful study of the carrying out of allotment in the years following the enactment of the law", the conclusion is the same:

> The Dawes Act, providing for the twenty-five-year Federal *trust period during which time* the land might not be encumbered, meant, it was clear, that no State could tax the allottee's holdings. . . . Otis, *The Dawes Act and the Allotment of Indian Lands*, at 105 Prucha edition (1973) (originally entitled *History of the Allotment Policy*) (emphasis added).

Citations to other scholarly works that have continued to confirm this understanding up to the present time could fill a small book. One recent thesis, by the same author cited by this Court in *Solem v. Bartlett*, 465 U.S. 463, at 480, n.25 (1984), F. Hoxie, entitled *Beyond Savagery, The Campaign to Assimilate the American Indians*, 1880-1920 states:

> For the remainder of his term, federal funds were used only for "restricted" non-tax-paying Indians. Patented tribesmen—who presumably paid property taxes—were usually expected to attend the public schools. . . .
>
> This was the doctrine of guardianship. As it evolved between 1890 and 1920, the concept of federal control over individual Indians was used to protect *land* titles, to continue *tax exemptions* on *trust* land. . . . The severalty law granted all allottees citizenship, but stipulated that their homesteads would be *held under a trust title* that prevented the sale of their land and *exempted them from taxation*. . . . F. Hoxie, *supra*, at 554, 566, 568 (emphasis added).

However, the most recent example undoubtedly is the 1991 article by a Bureau of Indian Affairs historian, from Washington, D.C. Michael L. Lawson. In this feature article, the author recounts:

> [T]he General Allotment Act provided that title to these allotments would be held in trust by the United States for at least twenty-five years *during* which time the land could not be sold, leased, *taxed*, mortgaged, devised by will, or otherwise encumbered

> without the consent of the federal government. It was hoped that by the end of this probationary period, the individual allottee, who would then be eligible to receive the usual *fee simple title* to the land, would have learned how to make productive use of the acreage, to know its market value, and to be ready to assume full responsibility for it, including the payment of the *taxes*. . . .
>
> [I]f this was found not to be the case, the law gave the President discretionary power to extend the *trust period*. . . . *S.D. State History Soc'y Quarterly*, No. 1 at 4 (1991).[2]

III. The General Allotment Act Has Been Consistently Construed to Clearly Authorize the Taxation of Fee Patent Land.

Although this Court generally discussed the General Allotment Act in *Draper v. United States*, 140 U.S. 240 (1891), it was not until 1903 that a tax related issue reached this Court in *United States v. Rickert*, 188 U.S. 432 (1903). There, the United States correctly headed its argument with the proposition that "the lands of the Indian allottees are not taxable under the authority of the State *during* the trust period" and concluded that improvements were similarly "exempt from taxation *during* the trust period that the land is so exempt, such improvements being in legal contemplation land". Brief for the United States at 15, 42, *Rickert*, *supra* (emphasis added). The *Rickert* opinion reflects this representation:

> no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question *until* at least the fee was conveyed to the Indians. . . . *While* the title to the land remained in the United States, the permanent improvements, could no more be sold for local taxes than could the land to which they belonged.

Rickert, 188 U.S. at 437, 442 (emphasis added).

A few years later, in *Goudy v. Meath*, 203 U.S. 146, (1906), a related issue was generally discussed and de-

---

[2] *See* Prucha, *The Great Father* (1984).

cisively resolved. The *Goudy* argument, addressed in detail by others, need not be repeated here.

In *United States v. Nice*, 241 U.S. 591 (1916), a case involving a federal prosecution for the sale of liquor to a tribal member with a 1902 trust patent, the United States only indirectly touched on this aspect of General Allotment Act and the status of the individual:

> [C]ongress by this very act of 1887 expressly retained control over the allottee Indian's land *by restrictions of alienation and trusteeship*. . . . The State, having *no power to tax* these Indian [trust] allotments, had no particular interest in the Indian's welfare. . . . [I]t was well established that State laws relating to *taxation* of his [trust] property did not apply. . . .

Brief of the United States at 26, 21, 12, *Nice*, *supra* (emphasis added).

The Court in *Nice* referred to this aspect of the General Allotment Act when it described the holding in *Rickert*, *supra*,

> The act of 1887 came under consideration in *United States v. Rickert*, 188 U.S. 432, a case involving the power of the State of South Dakota to tax allottees under that act, according to the laws of the State, upon their allotments, the permanent improvements thereon and the horses, cattle and other personal property issued to them by the United States and used on their [trust] allotments, and this court, after reviewing the provisions of the act and saying, p. 437, "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition", held that the State was *without power to tax* the [trust] *lands* and other property, because the same were being held and used in carrying out a policy of the Government. . . .

Nice, *supra* (emphasis added).

Two years later, the United States was more succinct when it argued another tax exemption issue in *United States v. McCurdy*, 246 U.S. 263 (1918).

> Partial emancipation from the Federal guardianship, accompanied by restricted ownership of land *for a limited period*, as a method of educating and preparing the Indians for the duties of civilized life, was adopted by Congress at an early date and has become a settled national policy. . . . In *United States v. Rickert*, 188 U.S. 432, it was decided that *trust* allotments and personal property issued to Indian allottees could not be taxed by a State because this would be "to tax an instrumentality employed by the United States for the benefit and control of this dependent race". . . .

Brief for the United States at 9, 11, 12, *McCurdy, supra*, (emphasis added).

In *McCurdy*, the United States argued that land purchased with trust funds for an Osage Indian, as evidenced by a restrictive deed, should not be taxable by the State of Oklahoma. The *McCurdy* Opinion rejected the tax exemption argument of the United States in no uncertain terms. At the same time, the Court clearly restated the basis of *Rickert, supra*:

> There is also a *clear distinction* between the present case and those like *United States v. Rickert*, 188 U.S. 432, 23 Sup.Ct. 478, 47 L. Ed. 532, where it was sought to tax property, *the legal title of which was in the United States* and which was held by it for the benefit of Indians.

Brief for the United States at 266, *McCurdy, supra* (emphasis added). Nothing in *United States v. Nice, supra*, was argued or cited by the United States and *Nice* did not figure in the Opinion of the Court in *United States v. McCurdy, supra*, and correctly so.

A case more directly on point reached this Court in 1939. In *Board of Comm'rs of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939), the United States equated a General Allotment Act trust patent with the exemption from taxation:

> The *trust patents* issued in fulfillment of that treaty and pursuant to the General Allotment Act of 1887

> [24 Stat. 388 (sec. 5), as amended by Act of May 8, 1906, c. 2348, 34 Stat. 182] bound by the United States to convey the land "free of all charge or incumbrance whatever" at the end of the *trust period. Such* [trust] *patents* have uniformly been construed to grant to the Indians a broad exemption from all forms of taxation effecting the land.

Brief for the United States at 6-7, *Board of Comm'rs of Jackson County, Kansas, supra* (emphasis added).

Although *Board of Comm'rs of Jackson County, Kansas* only involved the question of whether interest should be awarded when taxes were erroneously assessed, the opinion mentions the General Allotment Act and reflects the understanding of that time:

> The land which gave rise to this controversy, situated in Jackson County, Kansas, was [trust] patented under the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. § 348. In pursuance of this Act, the United States agreed to hold the land for twenty-five years under the restrictions of the 1861 Treaty, subject to extension at the President's discretion. . . .
>
> In this legislative setting, the Secretary of the Interior in 1918, over the objection of M-Ko-Quah-Wah, cancelled her outstanding *trust patent* and in its place issued a *fee simple patent.* This was duly recorded in the Registry of Deeds for Jackson County. *In consequence* Jackson County in 1919 began to subject the land to its *regular property taxes.* It continued to do so as long as this *fee simple patent* was left undisturbed by the United States. . . . Jackson County in all innocence acted *in reliance on a fee patent* given under the hand of the President of the United States. . . . Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. By virtue of the *most authoritative semblance of legitimacy under national law,* the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the

> intricacies of Indian law did not call Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes which she had *every practical justification* for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she *could not* have known was not *properly* hers.

Board of Comm'rs, supra at 348-349, 352-353 (emphasis added).

In 1943, in a most instructive case that involved a special modification of the twenty-five year trust limitation of the General Allotment Act, the United States recounted to this Court that the General Allotment Act "has been *uniformly construed* as conferring upon the Indians a vested 25-year tax exemption. . . ." and the United States conceded that subsequent to that period, the land was legally taxable. Brief for the United States, at 17, 43, *Mahnomen County v. United States*, 319 U.S. 474 (1943) (emphasis added). The *Mahnomen* decision reflects this important concession in no uncertain terms:

> It is *conceded* that any limitation on the County's power to tax *expired* in 1928 with the termination of the twenty-five year trust described below.

Mahnomen, 319 U.S. at 475 (emphasis added).[3]

In 1952, the United States in *Bailess v. Paukune*, 344 U.S. 171 (1952), generally described two instances where it deemed taxation to be "forbidden by the General Allotment Act".

> [w]hether *under trust patents* or *under fee patents with restrictions* upon alienation. . . .

Brief for the United States at 2, *Bailess v. Paukune*, *supra* (emphasis added).

Bailess involved the taxation of land of an allegedly Indian widow, who in due course was to receive a "fee

---

[3] Most of the important early cases of this Court are discussed in detail in the Brief for the United States, *Mahnomen*, *supra*. Also, *see Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987), and *County of Thurston v. Andrus*, 586 F.2d 1212 (8th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979).

patent" for the interest she inherited from her husband in a trust allotment. The Court concluded her interest was taxable if she was a non-Indian and in the process noted:

> This allotment was made under the General Allotment Act of February 8, 1887, 24 Stat. 388, 389. . . . No fee patent to the land has issued to *Paukune*, to his widow, or to the son. The trust period of twenty-five years has from time to time been extended. In other words, the United States still holds the land in trust for *Paukune* and his heirs. . . .

Bailess v. Paukune, 344 U.S. at 171-172 (emphasis added).

In 1956, in an income tax case that involved the General Allotment Act, as amended by the Burke Act of 1906, *supra*, the United States succinctly stated that:

> this provision was undoubtedly intended *to make it clear* that Indian lands transferred *in fee* to the Indians would *thereafter* be subject to state and local taxation. . . .

Brief for the Petitioner, note 4 at 13, *Squire v. Capoeman*, 351 U.S. 1, 13, n.4 (1956) (emphasis added). The opinion of the Court accepted the basic premise of the argument:

> The Government argues that this amendment was directed solely at permitting state and local taxation *after a transfer in fee*, but there is no indication in the legislative history of the amendment that it was to be so limited. . . . The literal language of the proviso evinces a congressional intent to subject an Indian allotment to *all taxes only after a patent in fee* is issued to the allottee.

Squire, 351 U.S. at 7-8 (emphasis added).

In 1973, in *United States v. Mason*, 412 U.S. 391 (1973), the United States noted that the Court in *Squire*:

> relied on language in an amendment to the General Allotment Act providing for *taxation of the land after the allottee receives a patent in fee* . . . [and] held that an amendment to the General Allotment

> Act created a tax exemption by implication, and that it required the return of the trust property without encumbrances at the end of the trust period . . . *and provided for taxation after the termination of the trust.*

Brief for the United States, at 9-10, 17, *Mason*, *supra* (emphasis added). The Court in *Mason* agreed:

> Moreover, the *Squire* decision rested heavily on the provision in the General Allotment Act providing for the removal of 'all restrictions as to sale, encumbrance, or taxation' *when Indian property is granted in fee.* . . .

Mason, 412 U.S. at 396 (emphasis added). Even Mr. Hobbs, arguing for the tribal respondents in oral argument, stated:

> The next thing that happens is that in 1906 Congress amends the General Allotment Act, and it says that—for the first time adds the idea that the trust period can end sooner than the 25 years intended if the Indian becomes competent sooner than that time. And it says that after he reaches the point of competency, the trust will end and he gets his land, and all restrictions as to alienation and *taxation are lifted.* This implies that Congress thought that the land was free of tax up to that point and well so. Over sixty years ago this Supreme Court, in 1903, had held that a restriction on alienation added up to a tax exemption. So, Congress assumed on very good authority in 1906 that the restriction on alienation was the equivalent of a tax exemption.

Tr. of Oral Argument, at 38, *United States v. Mason*, 412 U.S. 391 (1978) (emphasis added).

Most recently, in *United States v. Mitchell*, 445 U.S. 535 (1980), the United States reviewed the entire history of the General Allotment Act. Again, the United States told this Court the exemption to state taxation coincided with the trust period:

> The General Allotment Act . . . for the limited purposes of (a) restraining improvident alienation of the

> land by the allottees and (b) affording an immunity from state taxation for the period *during* which the legal title remained in the United States. . . .

Brief for the United States at 24, *Mitchell*, *supra* (emphasis added). In oral argument, Mr. Claiborne, arguing for the United States, said the same thing:

> That statute contemplated a scheme whereby the land of the reservation would be divided among the Indians within 25 years, and in the *meantime*, the United States was simply to hold title in trust solely for the *purpose* of preventing state taxation, it being legal title in the United States and therefore exempt from state taxation.

Tr. of Oral Argument, at 14, *United States* v. *Mitchell*, 445 U.S. 535 (1980) (emphasis added). This Court agreed:

> [W]hen Congress enacted the General Allotment Act, it intended . . . to prevent alienation of the land and to ensure that allottees would be immune from state taxation.

Mitchell, 445 U.S. at 544. At the end of this conclusion, the Court quoted at length and added emphasis to the remarks of Representative Skinner, the sponsor in the House of Representatives: ". . . 'land *is made inalienable and non-taxable for a sufficient length of time.*' . . ." *Mitchell*, 445 U.S. at 544, n.5 (emphasis as in original except for a sufficient length of time). In dissenting, Justice White described the holding of the Court in the same terms:

> The Court holds, however, that the 'trust' established by § 5 is not a trust as that term is commonly understood, and that Congress had no intention of imposing full fiduciary obligations on the United States. Congress' purposes, it is said, were narrower: to impose a restraint on alienation by Indian allottees while ensuring *immunity from state taxation during the period* of the restraint.

Mitchell, 445 U.S. at 546, 547 (White, J., dissenting) (emphasis added). It is significant that the arguments

the United States submitted in *Mitchell* were presented subsequent to the decisions of this Court that the United States now advances to undermine the same position.

In addition, in many cases, this Court has addressed in detail the arguments, principles and rules of construction that govern this case. *See, e.g., Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)[4] and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). The Congressional documents set forth above more than satisfy the standards of clarity required here to sanction the taxation of Indian fee lands. It is too late in the day to give serious credence to an unsubstantiated argument that this understanding and established practice has been somehow repealed by implication—especially without anyone having even *mentioned* the fact until now.

CONCLUSION

The judgment of the Court of Appeals should be affirmed, except as to real estate excise taxes and the *Brendale* remand.

Respectfully submitted,

SUSAN W. PAHLKE
Todd County Deputy
States Attorney
P.O. Box 432
Winner, South Dakota 57580
(605) 842-2551

TOM D. TOBIN *
TOBIN LAW OFFICES, P.C.
422 Main Street
Winner, South Dakota 57580
(605) 842-2500
* Counsel of Record

July 1, 1991

---

[4] Even so, in the special area of state taxation, *absent* cession of jurisdiction or other federal statutes *permitting it*, there has been no satisfactory authority for *taxing* Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan* v. *Arizona State Tax Comm'n, supra*, lays to rest any doubt in this *respect* by holding that such taxation is not permissible *absent congressional consent.*

Mescalero Apache Tribe, 411 U.S. at 148 (emphasis added).